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In the Supreme Court of the United States

OCTOBER TERM, 1994

In Re
WALTER F. BIGGINS

ON PETITION FOR A WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF RESPONDENTS HAZEN PAPER COMPANY, ET AL. IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Circuit violated the Federal Rules of Civil Procedure or the United States Constitution in ordering a new trial of Petitioner's age discrimination claim, due to the likelihood that jury confusion infected the original verdict.

2. Whether the First Circuit violated the judgment of this Court in ordering a new trial on grounds of jury confusion, where this Court had previously vacated Petitioner's age discrimination verdict and remanded the matter for further consideration of the sufficiency of the evidence and for proceedings not inconsistent with this Court's judgment.

PARTIES

Petitioner and Respondents are identified in the Petition.[1]

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[1] Hazen Paper Company is a private, closely held corporation organized under the laws of the Commonwealth of Massachusetts. The Company has no parent or subsidiary entities.

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ON PETITION FOR A WRIT OF MANDAMUS OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals on remand (Pet., App. B.) is not reported. The *en banc* opinion of the Court of Appeals denying rehearing (Pet., App. A) is not reported. The panel opinion of the Court of Appeals on remand (Pet., App. D) is not reported. An earlier opinion of the Court of Appeals, subsequently vacated by order of this Court, *see Hazen Paper Co. v. Biggins,* 113 S. Ct. 1701 (1993), is reported at 953 F.2d 1405 (1st Cir. 1992). The Memorandum and Order of the United States District Court for the District of Massachusetts (Pet., App. F) is not reported.

STATUTES, RULES AND CONSTITUTIONAL PROVISION

28 U.S.C. § 2106 provides that:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, provides in material part:

> §623. Prohibition of age discrimination
>
> (a) Employer Practices. It shall be unlawful for an employer - 1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

Fed. R. Civ. P. 38(a) provides:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

I. STATEMENT OF THE CASE

The Petitioner in this action, Walter F. Biggins ("Biggins"), was discharged from his position as Technical Director of Hazen Paper Company in June, 1986, when he refused to sign a confidentiality agreement required of him as a condition of continuing employment at the Company. Following his discharge, Petitioner filed a complaint in the United States District Court for the District of Massachusetts alleging, among other things, that the Company and its principal officers, Robert and Thomas Hazen (the "Hazens"), had required him to sign the confidentiality agreement not for any legitimate reason, but rather to force him from the Company before his pension could vest. In this regard, Petitioner alleged that Hazen Paper's conduct had violated his rights under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the "ADEA"), as well as under Section 510 of the Employee Retirement Income Security Act, 29 U.S.C. § 1140 ("ERISA").

A trial of the matter was held before the District Court in July, 1990, and resulted in a verdict for Biggins on both claims.[2] In reviewing the Hazens' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, the District Court conceded that the evidence of age discrimination was "a bit thin". The Court nonetheless concluded that the evidence -- including, in particular, evidence concerning the Company's alleged intent to deprive Biggins of his pension, *see* App. F. at pp. 34a-35a -- was legally sufficient to support a finding of age discrimination. (*Id.*, at pp. 35a-36a.)

The United States Court of Appeals for the First Circuit affirmed the ADEA verdict, concluding that the evidence was sufficient to warrant a jury finding that the Hazens had acted to prevent Biggins from vesting in

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[2] The jury also entered verdicts for Biggins on separate state law claims of fraud, wrongful discharge, violation of the Massachusetts Civil Rights Act, Mass. G. L. c. 12, §§ 11H and I, and breach of contract.

his Company pension, and that this amounted to unlawful age discrimination and a violation of ERISA. *See Biggins v. Hazen Paper Co.*, 953 F.2d 1405 (1st Cir. 1992). After noting that Biggins had been the only employee asked to sign a confidentiality agreement, and that his younger replacement was asked to sign a less onerous contract, the Court of Appeals reasoned:

> "[T]he jury could reasonably have found that Thomas Hazen decided to fire Biggins before his pension rights vested and used the confidentiality agreement as a means to that end. The jury could also have reasonably found that age was inextricably intertwined with the decision to fire Biggins. If it were not for Biggins' age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. Biggins was fifty-two years old when he was hired; his pension rights vested in ten years." (*Id.* at 1412.)

After granting certiorari to the Hazens, this Court vacated the First Circuit's decision with respect to ADEA liability. In *Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701 (1993), this Court unanimously held that an employer does not commit unlawful age discrimination if it relies upon criteria that may have some factual correlation to age -- such as years of service or pension status -- but are not in themselves age-based. The Court then remanded the case to the First Circuit for further consideration of whether there was any other evidence sufficient to support a finding of age discrimination. In this regard, the Court stated:

> "Although there was no direct evidence of petitioners' motivation, except for two isolated comments by the Hazens, the Court of Appeals did note the following indirect evidence: Respondent was asked to sign a confidentiality agreement, even though no other employee had been required to do so, and his replacement was a younger man who was given a less onerous agreement. In the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's explanation for its decision -- here, that respondent had been disloyal

to Hazen Paper by doing business with its competitors -- is 'unworthy of credence.' But inferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where other unsavory motives, such as pension interference, were present. This issue is now before us in the Title VII context, *see Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (CA8 1992), *cert. granted*, 506 U.S. ___, 113 S. Ct. 954, 122 L.Ed.2d 111 (1993), and we will not address it prematurely. We therefore remand the case for the Court of Appeals to reconsider whether the jury had sufficient evidence to find an ADEA violation."

Hazen Paper, 113 St. Ct. at 1708.

This Court subsequently announced its decision in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993). Echoing its earlier opinion in *Hazen Paper*, the *St. Mary's* Court held that even convincing evidence of disparate treatment and pretext would not, by itself, compel a finding of impermissible discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 *et seq.* ("Title VII"), because Title VII prohibits discrimination rather than perjury. As in this case, the Court recognized that the fact that an employer may have given a false reason for its action will not, in all circumstances, warrant the conclusion that the employer acted from discriminatory motives. *See St. Mary's*, 113 S. Ct. at 2756. The Court did not address -- because no such issue was before it -- the question of what evidence would suffice to permit a finding of impermissible discrimination, except to say in dictum that:

"The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."

See St. Mary's, 113 S. Ct. at 2749.

The Court's observation about what might permit a finding of discrimination in some cases was not essential to the holding in *St. Mary's*, and in no way addressed the situation existing in the present case -- *i.e.*, an allegation by the plaintiff, and a finding by the jury, that the employer had acted from an unsavory motive that was wholly unrelated to *age discrimination*. Nonetheless, in its initial opinion on remand, the First Circuit relied upon *St. Mary's* to hold (once again) that the evidence of pretext in this case *required* an affirmance of the jury's age discrimination verdict. Thus, after reciting precisely the same evidence it had referenced in its earlier opinion to support a finding of intentional pension interference -- *i.e.*, the fact that Biggins had been the only employee asked to sign a confidentiality agreement, and his younger replacement (who was not close to pension vesting) was given a less onerous contract -- the First Circuit stated:

> "Reading *Hazen Paper* and *St. Mary's* in tandem *compels* us to conclude that, absent any interference with the vesting of plaintiff's pension, there was sufficient evidence for the jury to find an ADEA violation."

(Pet., at 26a (emphasis added).)

The Hazens thereafter filed a timely petition for rehearing and suggestion of rehearing *en banc* from the First Circuit's decision. That petition was taken under advisement for several months.

On March 1, 1994, the First Circuit, sitting *en banc* issued an order directing the parties to show cause why, in light of the danger that the original jury took negative account of the Hazens' ostensible desire to deprive Biggins of a pension in reaching its ADEA verdict, the matter should not be remanded to the District Court for a full new trial of plaintiff's ADEA claim. (Pet., App. C.) On June 27, 1994, after reviewing the parties' responses to its show cause order, the *en banc* court issued a

further order (the "en banc order") withdrawing the panel's October, 1993 decision and remanding the ADEA claim to the District Court for a full new trial. In issuing this *en banc* decision, the Court stated:

> "The show cause order issued on March 1, 1994. The court has now received the memoranda filed by the parties in response to this show cause order and has concluded that the likelihood of verdict contamination with respect to the count at issue is sufficiently great that the interests of justice require a full new trial on the age discrimination claim."

(Pet., at 9a.)

Biggins thereafter filed a petition for rehearing of the en banc order. On August 10, 1994, the Court denied Biggins' request for rehearing. (Pet., at 2a.) The instant Petition followed.

II. REASONS FOR DENYING THE WRITS

The decision of the Court of Appeals remanding Biggins' ADEA claim to the District Court for a new trial is fully consistent with the Seventh Amendment and Rule 38 of the Federal Rules of Civil Procedure. The decision is likewise consistent with the Court's prior mandate in this case. The Petition submitted by Biggins presents no issue warranting review by this Court, either by writ of certiorari or writ of mandamus.

Biggins' Petition fundamentally misperceives the latitude afforded a reviewing court by the Federal Rules and the United States Constitution to correct judgments which, if allowed to stand, might otherwise work a serious injustice. Moreover, in suggesting that the First Circuit's *en banc* court merely "speculated" that the jury might have relied on evidence of pension interference to find age discrimination, Petitioner disregards the very theory of liability which he argued to the jury at trial and to every reviewing court thereafter. Finally, the Petitioner raises no legal issue that even remotely satisfies the high standards set by this Court for granting

review on writ of certiorari. For each of these reasons, the Petition should be denied.

With respect to the Petitioner's alternative request for writ of mandamus, nothing in the First Circuit's en banc order violates the terms of this Court's mandate, or fails to give full and proper effect to this Court's prior rulings. To the contrary, applying this Court's dictate that evidence of pension interference could not properly have played any role in the jury's decision, the First Circuit fairly concluded that, regardless of whether the remaining evidence of age discrimination was sufficient to support a verdict in Biggins' favor, there was, nonetheless, a substantial risk that jurors might have fallen prey to the very error of reasoning urged on them by Petitioner. In remediating this risk through the grant of a new trial, the First Circuit has faithfully adhered to this Court's judgment, and has not so departed from the Court's mandate as to warrant the extraordinary writ sought by Petitioner.

A. *The First Circuit's En Banc Order Of A New Trial Was Well Within The Court's Authority, Warranted By The Facts Of This Case, And Fully Consistent With The Seventh Amendment To The United States Constitution.*

In his Petition to this Court, Biggins asserts that a new trial may only be ordered by the trial court and that -- even if an appellate court could grant a new trial -- it could not do so on the grounds set forth in the First Circuit's en banc order. The Petition further asserts that the First Circuit merely "assumed" that the jury might have been misled by the evidence and argument advanced by plaintiff below, and that the en banc order for a new trial represents some vast and unprecedented incursion into the right to jury trial guaranteed by the Seventh Amendment. These arguments will not withstand scrutiny, and provide no grounds for invoking this Court's discretionary review by writ of certiorari.

1. *The En Banc Court Acted Well Within Its Inherent And Statutory Authority In Ordering A New Trial Based On Likelihood Of Jury Confusion.*

Petition asserts that an appellate court lacks the authority to order a new trial where, as here, it finds a substantial danger that the jury was confused in reaching its verdict. This is simply wrong. The power of an appellate court to order new trials is expressly recognized in 28 U.S.C. § 2106. That statute provides that a court of appellate jurisdiction may, in all cases before it, "remand the cause and . . . require such further proceedings to be had as may be *just under the circumstances*." (Emphasis added.) *See, e.g., United States v. Morow,* 182 F.2d 986, 989 (D.C. Cir. 1950) (noting statutory authority of appellate courts to order new trial); *see also Samuels v. Health and Hospitals Corp.*, 591 F.2d 195, 199 (2d Cir. 1979) ("Like trial courts, an appellate court has the authority to grant a new trial in the interest of justice"). *Accord Furr v. Herzmark,* 206 F.2d 468, 472 (D.C. Cir. 1953); *Atkinson v. Dixie Greyhound Lines,* 143 F.2d 477, 479 (5th Cir.), *cert. denied,* 323 U.S. 758 (1944); *Thompson v. Company,* 167 F.2d 733, 734 (6th Cir.), *cert. denied,* 335 U.S. 824 (1948); *Brown v. Richard H. Wacholz, Inc.*, 467 F.2d 18, 21 (10th Cir. 1972); *Camalier & Buckley-Madison, Inc. v. Madison Hotel, Inc.*, 513 F.2d 407, 420-21 n.94 (1975).[3]

Acting pursuant to this authority, numerous federal courts of appeal have in fact ordered a new trial where, as here, they have found a substantial likelihood that the jury was confused when it reached its verdict on a claim before it. *See, e.g., Davet v. Maccarone,* 973 F.2d 22, 28 (1st Cir. 1992) (where confusion likely, new trial proper if it "could have affected the result of the jury deliberations"); *Latsis v. Chandris, Inc.*, 20 F.3d 45, 53 n.4 (2d Cir. 1994) (new trial ordered where jury confusion

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[3] *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33 (1980), cited by Petitioner, is not to the contrary. *Allied Chemical* merely stands for the proposition that a district court's decision whether to order a new trial is a discretionary one, *not* that the district court alone has the discretion to make such an order.

likely); *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) (new trial ordered to remedy likelihood of jury confusion); *Savarese v. Agriss*, 883 F.2d 1194, 1205 (3d Cir. 1989) (new trial ordered where jury may have been confused on issue of liability); *Dixon v. CSX Transportation, Inc.*, 990 F.2d 1440, 1444 (4th Cir. 1993) (new trial ordered where jury may have confused theories of liability); *Folks v. Kirby Forest Indus.*, 10 F.3d 1173, 1178 (5th Cir. 1994) (jury confusion warrants new trial); *Chonich v. Wayne County Community College*, 973 F.2d 1271, 1282 (6th Cir. 1992) (*en banc*) (case remanded for second time for new trial due to possibility of jury confusion); *Wagner v. Case Corp.*, ____F.3d ____, 1994 WL 469864, at *1 (10th Cir. 1994) (where jury may have been misled and extent of confusion unknowable, new trial ordered by appellate court); *Somer v. Johnson*, 704 F.2d 1473, 1478 (11th Cir. 1983) ("the possibility that the jury may have employed the wrong criterion of liability . . . requires a new trial"); *United States Fire Ins. Co. v. Pressed Steel Tank Co.*, 852 F.2d 313, 317 (7th Cir. 1988) (where jury may have been confused, new trial ordered); *Farmland Industries, Inc. v. Morrison-Quirk Grain Corp.*, 987 F.2d 1335, 1343 (8th Cir. 1993) (new trial ordered where jury may have been confused; "We are left with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations"); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 207 (9th Cir. 1989) (same); *Edmonds, Inc. v. McPherson Building Corp.*, 332 F.2d 309, 311 (D.C. Cir. 1964) (though evidence was properly admitted for one purpose, danger that jury may have been confused and misapplied such evidence in finding liability required new trial).[4]

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[4] Petitioner's refrain that the jury charge with respect to ADEA liability was not erroneous completely misses the point. The issue identified by the *en banc* court is not that the trial judge's charge was in error, but that Biggins' presentation of the case asked the jury to find liability on an impermissible basis. Thus, even if the jury faithfully followed the trial judge's instructions, nothing in those instructions would have prevented the improper outcome (*i.e.*, reliance upon pension interference as proof of age discrimination) which Biggins himself sought.

That the risk of jury confusion requiring a new trial may result from the misleading argument of counsel (even where such argument is not inflammatory), is equally well settled. *See, e.g., McInnis v. A.M.F., Inc.*, 765 F.2d 240, 251 (1st Cir. 1985) (emphasis placed on improper evidence during both examination of witness and closing arguments "compels us to conclude that the jury most likely drew the desired but improper inference"); *Ayoub v. Spencer*, 550 F.2d 164, 170 (3d Cir. 1977) ("Reversible error is committed when counsel's closing argument to the jury introduces extraneous matter which has a reasonable probability of influencing the verdict"); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1350-55 (3d Cir. 1975) (new trial required where counsel argued merits of liability on basis of evidence properly admitted only to show witness bias); *Leathers v. General Motors Corp.*, 546 F.2d 1083, 1086 (4th Cir. 1976) (opening statement which asked jurors to place themselves in plaintiff's position required new trial after verdict for plaintiff); *Werner v. Upjohn Co.*, 628 F.2d 848, 854 (4th Cir. 1980) (new trial ordered where counsel erroneously argued that evidence admitted for another purpose could establish liability); *Rommel-McFerran Co. v. Local U. No. 369, Int. Bro. of Elec. Wkrs.*, 361 F.2d 658 (6th Cir. 1966) (holding that where counsel brought unrelated subjects to bear on jury's decision, "and, where there is a reasonable probability that the verdict of the jury has been influenced by such conduct, it should be set aside"); *Murphy v. L&J Press Corp.*, 558 F.2d 407, 411 (8th Cir. 1977) (argument of counsel that evidence admitted only for another purpose could establish liability required new trial; general instruction that the court, and not the lawyers, will instruct the jury on matters of law held insufficient to preclude possibility of tainted verdict).

Nor was the *en banc* court precluded from ordering a new trial because counsel for the Hazers failed to request an instruction that the jury not consider evidence of pension interference in reaching its age discrimination verdict, as Petitioner suggests. *See, e.g., City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981) (appellate review of jury instructions proper to correct plain error, even in the absence of timely objection); *Morris v. Travisono*, 528 F.2d 856, 859 (1st Cir. 1976)(same); *Bereda v. Pickering*

Creek Indus. Park, 865 F.2d 49, 53 (3d Cir. 1989) (defendant's failure to request instruction on damages limit in discrimination suit held no bar to review for plain error; new trial ordered); *see generally Rodrique v. Dixilyn Corp.*, 620 F.2d 537, 540 (5th Cir. 1980) (collecting cases). Review is equally available on appeal as to improper argument of counsel, even in the absence of a contemporaneous objection. *See, e.g., Leathers, supra*, 546 F.2d at 1086. Moreover, where, as here, the substantive legal issue as to which an instruction might have been sought (*i.e.*, the relevance of pension interference to a claim of age discrimination) was itself uncertain at the time of trial, appellate review need not be limited to a search for plain error. Rather, "[t]he very novelty of the legal issue at stake counsels unconstricted review," and such plenary consideration is authorized "in the interests of justice" by 28 U.S.C. § 2106. *City of Newport, supra*, 453 U.S. at 257 & n.16 (vacating jury verdict and remanding for further proceedings, notwithstanding absence of either plain error or contemporaneous objection).

Petitioner further suggests that, in ordering a new trial, the First Circuit impermissibly reviewed the actions of the trial court for an "error of fact," and therefore failed to accord that court the deference due it.[5] This argument also lacks merit. The First Circuit's en banc order is premised on the jury confusion likely resulting from the error of *law* (*viz.*, the theory that a denial of pension benefits could stand in for proof of age discrimination) which was urged by Petitioner, and accepted by the District Court and First Circuit panel prior to this Court's unanimous decision to the contrary. Thus, in attempting to remedy the likely jury confusion

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[5] That the *en banc* court raised the issue of jury confusion *sua sponte* provides no basis for review by this Court. It is well settled that an appellate court may notice error "not presented by the parties ... *Washington v. Davis*, 426 U.S. 229, 238 (1976); *Silber v. United States*, 370 U.S. 717, 718 (1962), decide an issue not raised in the lower federal courts, *see Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980), or review an issue neither decided below nor presented by the parties, *see Wood v. Georgia*, 450 U.S. 261, 265 n.5; *Youakim v. Miller*, 425 U.S. 231, 234 (1976)." *City of Newport, supra*, 453 U.S. at 257 n.15.

engendered by an erroneous legal theory pressed at trial, the First Circuit in no way invaded the proper domain of the trier of fact.[6]

For all of these reasons, the en banc order was well within the power of the Court of Appeals to issue. The arguments of the Petition to the contrary are without basis, and should be rejected.

2. *The En Banc Court's Concern Over The Likelihood Of Jury Confusion Was Well-Founded In The Record.*

The Petition next asserts that, in finding a likelihood of jury confusion, the *en banc* court improperly "assumed" or "speculated" -- without any foundation -- that the jury might have considered evidence of pension interference in reaching its age discrimination verdict. (*See* Pet., at p. 12.)

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[6] Similarly, the suggestion that the District Court had already addressed the issue of jury confusion, and that its ruling conformed to this Court's decision and must somehow be accorded deference, is spurious. In denying the defendant's post-verdict motion for new trial, the District Court ruled, correctly, that an employer could be motivated by both age animus (in violation of the ADEA) *and* a desire to defease protected pension rights (in violation of ERISA). The District Court never ruled, however, that the jury's consideration of the age issue was uninfluenced by the evidence of pension interference. To the exact contrary, the District Court held that age discrimination *could* be inferred if evidence of pension interference were considered, precisely the rationale which this Court later rejected. Such a determination, made on the basis of a mistake of law, is entitled to no deference from an appellate court (*see 6A Moore's Federal Practice*, at p. 59-140 (1994 ed.)), and in any event does not address the jury confusion issue raised by the en banc order. Nor does the en banc order in any way suggest that ERISA and ADEA claims cannot be tried together, as Petitioner has asserted. (*See* Pet., at pp. 16-17.) Rather, the First Circuit merely gave effect to this Court's command that, where the two causes of action *are* tried together, the evidence of one type of discrimination not be allowed to substitute for proof of the other.

This argument is frivolous. As a review of the proceedings below readily makes clear, the First Circuit's conclusion that the jury may have taken negative account of pension interference in finding age discrimination is abundantly supported by the record.

From his filing of the Complaint in this matter forward, Petitioner has consistently asserted his view that age discrimination may be inferred from the Hazens' purported desire to deprive him of pension benefits. (*See* Complaint, Count I (Age Discrimination), ¶ 18 ("The conduct of the defendants in terminating the plaintiff's employment, replacing him with a younger individual, and acting to deprive him of his pension benefit constitutes illegal age discrimination in violation of 29 U.S.C., Section 623.") The jury was asked to reach this same conclusion through the opening statement of Petitioner's counsel ("Biggins knew that the technical department was comprised of four people. Himself, age sixty-two and nearing pension vesting [and] [t]hree people in their thirties . . .. This age was used against him to attempt to force him to sign over [a manufacturing] process and to attempt to take away from him valuable rights. . . ."). Petitioner's counsel made the same appeal again in his closing argument ("Sixty-one, sixty-two. Almost vested in his pension. But they needed the pretext.") (*See* Trial Transcript, at pp. 237, 1053.)

Indeed, so effectively did Petitioner's counsel urge the identity between pension interference and age discrimination that the jury, the District Court and the pre-remand First Circuit panel were all persuaded by the argument. Only now, after this Court has declared that pension interference does not equal age animus, does Petitioner brand as "speculative" the view that the jury might improperly have taken account of pension evidence in rendering its ADEA verdict. Having himself led the jury (and each of the courts below) into the precise error condemned by this Court, however, Petitioner can hardly be heard to complain that the *en banc* court panel engaged in "speculation" when it concluded that the jury might have followed that

lead. *See Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 849 (D.C. Cir. 1981) ("If the judge was confused, we have no difficulty believing that the jury was also confused.").[7]

3. *The En Banc Court's Order Is Fully Consistent With The Requirements Of The Seventh Amendment.*

It is beyond dispute that a new trial may be ordered by an appellate court to correct errors of law, and that such an order does not violate the Seventh Amendment's re-examination clause. *See, e.g., Parsons v. Belford,* 3 Pet. 433, 447-48 (1830); *Capital Traction Co. v. Hof,* 174 U.S. 1, 13 (1899) (under the Seventh Amendment, "re-examination is allowed . . . upon a new trial, either granted by the court in which the first trial was held or to which the record was returnable, or ordered by an appellate court for error in law").

As set forth above, The First Circuit's en banc order rests squarely on the error of law injected by Petitioner into the trial proceedings. The First Circuit's order in no way intrudes upon the right to trial by jury, or reexamines any finding of fact (except to the extent that such finding was premised on an error of law). In remanding for a new trial, "it might be well . . . to point out that [the First Circuit did] not, in effect or in spirit, direct[ ] a verdict for [the Hazens]. . . . All that [is] expect[ed]on remand is that [the Hazens] have the opportunity to fairly and impartially present [their] case, that [Biggins] be awarded the same opportunity and that the issues remain clear." *Murphy, supra,* 558 F.2d at 412. Nothing in the First

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[7] Petitioner's suggestion that, in ordering a new trial, the First Circuit was required to determine to a certainty that the jury was misled is, of course, unfounded. *See, e.g., Coleman Motor Co., supra,* 525 F.2d at 1351, n.19 (new trial required where "it is impossible to tell what factors influenced the jury's decision"); *Wagner v. Case Corp., supra* (same); *Farmland Industries, Inc., supra* (same). The rationale for a new trial is particularly strong where, as here, the evidence supporting the jury's verdict was "thin". *See Leathers, supra,* 546 F.2d at 1086.

Circuit's order contravenes the requirements of the Seventh Amendment. Instead, the en banc order merely affords to both parties the very right to a fair trial which the Seventh Amendment guarantees.

4. *The Petition Demonstrates No Other Basis Warranting Review By Writ Of Certiorari.*

Finally, Petitioner complains that the First Circuit's en banc order will require still further proceedings in what has already been a protracted course of litigation. (Pet., at p. 25.) Any further delay or expense is, of course, unfortunate, and redounds equally to the detriment of both parties. Mere inconvenience, however, provides no basis for overriding the substantial concerns for justice properly identified by the First Circuit; and it is difficult to conceive how seeking further review in this Court, rather than proceeding promptly to a new trial, can better serve the interests of expedition.

Moreover, the protracted nature of this litigation -- as well as the prospect of a new trial -- reflects in great measure the time required to correct the legally erroneous theory of liability urged by Petitioner below and argued by him before this Court in earlier proceedings. Having himself sown the seeds of error, and indeed having nurtured them at every turn, Petitioner cannot credibly complain that the process of rectification is unduly slow.

In sum, Petitioner has failed to demonstrate any error in the decision of the First Circuit, has not identified any disagreement among the Circuits with respect to any issue of law raised by that decision, and has failed to identify any other reason why this Court should exercise its discretionary jurisdiction under 28 U.S.C. § 1651(a). Accordingly, the Petition for Writ of Certiorari should be denied.

B. *Mandamus Is Unwarranted Because The Ruling Of The First Circuit Is Fully Consistent With This Court's Mandate In The Present Case, And With The Court's Decision In St. Mary's Honor Center v. Hicks.*

In support of his Petition for Writ of Mandamus, Biggins urges that the First Circuit's en banc order violates the mandate of this Court, and is inconsistent with this Court's decision in *St. Mary's Honor Center v. Hicks, supra*. Neither argument is supportable.

1. *The En Banc Order Is Fully Consistent With This Court's Mandate.*

As the Petition correctly observes, a lower court is "bound to carry the mandate of [an] upper court into execution and could not consider the questions which the mandate laid at rest." *Sprague v. Ticonic Nat'l Bank,* 307 U.S. 161, 167 (1939) (quoted at Pet., at p. 25). However, as this Court's opinion in *Sprague* also makes clear, "[w]hile a mandate is controlling as to matters within its compass, on the remand a lower court is free as to other issues." *Id.* Similarly, this Court has held that, on remand, "the Circuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only." *In Re Sanford Fork & Tool Co.,* 160 U.S. 247, 256 (1895); *accord Wells Fargo & Co. v. Taylor,* 254 U.S. 175, 181-82 (1920) (appellate decision that pleadings were inadequate does not preclude lower court's allowance of amendment to the pleadings); *Quern v. Jordan,* 440 U.S. 332, 348 n.18 (1979) ("The doctrine of law of the ease comes into play only with respect to issues previously determined"; holding that where Supreme Court had previously reversed an award of money damages, Circuit Court was not barred from awarding notice relief). The issue of jury confusion raised in the en banc order was not even addressed -- much less laid to rest -- in this Court's earlier decision. To the contrary, this Court's decision merely provided the legal predicate (*i.e.*, the ruling that evidence of pension interference could not properly substitute for evidence

of age bias under the ADEA) on which the en banc order was founded.

This Court's decision in *Deen v. Hickman*, 358 U.S. 57 (1958), relied on by Petitioner, is not to the contrary. In *Deen*, this Court in an earlier decision had reversed a decision by the state's intermediate court of appeals that there was insufficient evidence to sustain a jury verdict. This Court found that "the proofs justified with reason the jury's conclusion," and therefore reversed the state appeals court. *See Deen v. Gulf, Colorado & Santa Fe R. Co.*, 353 U.S. 925 (1957). On remand, the state's intermediate appeals court affirmed the judgment in favor of the petitioner, subject to a remittitur. On further review, however, the state Supreme Court remanded the case again to the intermediate court of appeals, "with directions . . . to adjudicate, upon its own independent evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the United States, whether or not the jury finding . . . is so against the weight and preponderance of the evidence as to require a new trial . . .." *Deen v. Hickman, supra*, 358 U.S. at 57-58.

Not surprisingly, having already considered the sufficiency of the evidence in its earlier decision, this Court found in *Deen* that any re-determination of the weight of evidence on remand was foreclosed by its original decision, and that the instruction that the intermediate court of appeals act "wholly apart from the judgment of the United States Supreme Court" could not be given effect. In the present case, by contrast, this Court has never passed on the sufficiency of the evidence (except to suggest that a finding of age discrimination may be "problematic"), and has certainly never considered the issue of jury confusion, which was clearly presented for the first time by this Court's own holding that pension interference does not equate to age discrimination. *Deen* thus in no way controls the case at bar.

Moreover, this Court's holding in *Deen* had the effect of reinstating the jury's verdict, and thereby terminating the litigation. This Court's ruling in the present case, by contrast, specifically raised the question whether the jury's verdict could still be sustained in light of the Court's holding that

pension interference did not euqal age discrimination, and thus instructed the First Circuit to address that issue. This, of course, is precisely what the Court of Appeals, sitting *en banc* has done. Accordingly, rather than disobey the Court's mandate in this case, the *en banc* court complied with it fully. *See, e.g., In Re Sanford Fork & Tool Co., supra,* 160 U.S. at 259 ("The case being thus left open, by the opinion and mandate of this Court . . . for further proceedings . . . the Circuit Court might, in its discretion, [order a new trial]." *Id.* Petitioner had no reasonable basis for suggesting otherwise.[8]

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[8] The other cases relied on by Petitioner are equally unavailing. *Sibbald v. United States,* 37 U.S. (12 Pet.) 488 (1838), for example, holds only that the Circuit Court on remand may not question any finding which the Supreme Court has confirmed. At the same time, *Sibbald* recognizes that the Circuit Court must "determine all questions arising (in the mandate's execution) . . . [and] cause further to be done therein, what of right, according to law and justice, in conformity to the opinion and decree of this Court, ought to be done." *Id.* at 495 (emphasis original). Likewise, *United States v. Smith,* 331 U.S. 469 (1947), held improper a District Court's order of a new trial after remand solely on the ground that the court was limited in its exercise of that power by the requirement, under Fed. R. Crim. P. 33, that such an order issue within five days of the verdict, a limitation not imposed on an appellate court under 28 U.S.C. § 2106. *General Atomic Co. v. Felter,* 436 U.S. 493 (1978), merely holds that a state court cannot lawfully order the precise relief which an earlier opinion of the Superior Court has foreclosed, *id.* at 496, and plainly has no bearing on the present case. Similarly, in *Briggs v. Pennsylvania R. Co.,* 334 U.S. 304 (1948), the court of appeals had construed its own mandate as not permitting interest to be added to a verdict which it had affirmed, and had stricken interest added by the District Court on remand. The decision by this Court that the district judge's attempt to add interest could not stand in the face of the appellate court's mandate to the contrary is unexceptional, and obviously irrelevant to the present dispute. In *Gaines v. Rugg,* 148 U.S. 228, 240 (1893), this Court held that, on remand, a lower court could not take new evidence in support of exceptions to a decree which this court had previously affirmed. In the present case, this Court's decision has not affirmed, but has instead vacated the decision below, making further proceedings not only proper but necessary. Finally, in *In Re Potts,* 166 U.S. 263 (1897), the Circuit Court was found improperly to have entertained new evidence of the invalidity of certain

In sum, nothing in the First Circuit's en banc order remotely amounts to such a "judicial usurpation of power" that the "extraordinary remedy [of mandamus]" would be warranted. *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *DeBeers Consol Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)). To the contrary, the *en banc* order is fully consistent with this Court's prior opinion, and Petitioner cannot hope to meet his "burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'" *Id.* at 96 (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)).

2. *Nothing In The First Circuit's En Banc Order Is Inconsistent With This Court's Decision In St. Mary's Honor Center v. Hicks.*

In an apparent attempt to elevate the *en banc* court's unexceptional ruling into a matter warranting further review by this Court, Petitioner asserts that the First Circuit's decision is at odds with this Court's opinion in *St. Mary's Honor Center v. Hicks, supra*. (*See* Pet., at p. 27.) This argument misconstrues the dictum in *St. Mary's* on which it relies, and is in any event wholly beside the point of the en banc order.

Petitioner argues, based on a dictum of this Court in *St. Mary's*, that a finding of discrimination is warranted in *every* case in which a plaintiff makes out a *prima facie* showing of discrimination and also satisfies the trier of fact that the employer's proffered reason for its action is not the true reason. This is so, Petitioner claims, even where the evidence would not otherwise support a finding of discrimination, and even where the evidence

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patents which this Court had previously found to be valid. Plainly, *Potts* has no bearing on the present case. Moreover, to the extent that *Potts* relied on the former rule (no longer followed) that a lower court must seek appellate leave before initiating further proceedings on remand, it has been overruled. *See Standard Oil Co. v. United States*, 429 U.S. 17, 18 n.2 (1976). "[T]he appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events." *Id.* at 18.

establishes that the employer's true reason for its action was unrelated to prohibited discrimination. This theory, if adopted, would turn the discrimination laws into "perjury statutes," the very result rejected by this Court in *St. Mary's,* and would at the same time permit the imposition of liability where no discriminatory animus could fairly be inferred. Indeed, it was precisely such a scenario which this Court described as "problematic" in remanding the case at bar to the First Circuit.

The dictum in *St. Mary's,* in fact, requires no such result. Rather, as the Court was careful to note: "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) *may*, together with the elements of the *prima facie* case, suffice to show intentional discrimination." *See St. Mary's,* 113 S. Ct. at 2749 (emphasis added). That such evidence may, *in some cases*, suffice to show discrimination hardly suggests that it will suffice in every case. This is particularly true where, as here, the evidence points to other unsavory motives (such as pension interference) that are not discriminatory.[9]

More fundamentally, Petitioner's argument concerning *St. Mary's* is beside the point. Even if the evidence were sufficient to support a finding of discrimination, this would hardly be a bar to a determination that the

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[9] Petitioner argues that anything less than an "all-or-nothing" approach to evidence supporting disbelief of an employer's proffered reason would involve the courts in an impermissible "weighing" of the evidence. This argument is without merit. The issue, in every case, will be whether the quantum of evidence adduced by the plaintiff is sufficient to permit a reasonable jury to infer that, more likely than not, discrimination has occurred. This kind of weighing of the evidence (as distinct from an inquiry into the believability of the evidence) is, of course, what the court must properly do in deciding a motion for judgment n.o.v. in every case.

jury may have been confused and improperly relied on impermissible evidence in reaching the conclusion it did.[10] This was the concern which animated the *en banc* order.

In sum, nothing in the First Circuit's *en banc* order fairly draws into dispute the proper interpretation of this Court's decision in *St. Mary's*. Moreover, even if a finding of discrimination were supportable, such a finding would in no way be inconsistent with the *en banc* order of a new trial.

III. CONCLUSION

For all the foregoing reasons, the Petition For Writ Of Mandamus/Certiorari should be denied.

Respectfully submitted,

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[10] Indeed, only if the evidence were sufficient to *require* a verdict in Petitioner's favor would the First Circuit's "jury confusion" analysis have been unwarranted. As the District Court observed, however, the evidence of age discrimination was, at best, "thin." Moreover, this Court squarely held in *St. Mary's* that disbelief of an employer's articulated rationale does *not* require a verdict for the plaintiff in a discrimination suit, and no different conclusion can obtain in the present case.